IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
September 18, 2009 Session

JAMES T. HARVEY AND WIFE, MIRANDA HARVEY v. JAMES A. ELLIS AND WIFE, PATTY D. ELLIS, ET AL.

Appeal from the Chancery Court for DeKalb County
No. 2003-144 Ronald Thurman, Chancellor

No. M2008-01955-COA-R3-CV - Filed December 29, 2009

Landowners filed suit against predecessors-in-interest, adjoining landowners, and DeKalb County, asking, among other things, that title to their property be quieted in them according to a boundary survey done prior to closing and asserting a claim for breach of the Purchase and Sale Agreement against their predecessors-in-interest. The predecessors-in-interest filed a counterclaim, asking, among other things, for reformation of the deed on the ground of mistake in the boundary survey. The trial court dismissed landowners' claims, granted reformation of the deed, and denied predecessors-in-interest's request for attorneys' fees pursuant to a provision of the Purchase and Sale Agreement. Landowners and predecessors-in-interest appeal. Finding that the predecessors-in-interest were entitled to attorneys' fees, the trial court's finding is reversed and remanded. The judgment is affirmed in all other respects.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed in Part, Reversed in Part, and Remanded

RICHARD H. DINKINS, J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, P.J., M.S., and ANDY D. BENNETT, J., joined.

W. Timothy Harvey, Clarksville, Tennessee, for the appellants, James T. Harvey and Miranda Harvey.

Michael R. Jennings, Lebanon, Tennessee, for the appellees, James A. Ellis and Patty D. Ellis.

Tecia Puckett Pryor, Smithville, Tennessee, for the appellees, Elmer Lee Ellis, Jr. and Ada Sue Ellis.

Bratten Hale Cook, II, Smithville, Tennessee, for the appellees, Billy F. House and Susan House.

J. Hilton Conger, Smithville, Tennessee, for the appellee, DeKalb County Tennessee.

OPINION

In this appeal, we are asked to resolve a number of issues related to a boundary dispute, the main contention being whether the boundary of a property extends to the roads circling the property in question or whether the property's boundary line stops short of the roads on its western, eastern, and northern fronts.

I. Factual and Procedural Background

On December 21, 1998, James and Patty Ellis ("Ellises") purchased a parcel of property in DeKalb County ("Disputed Property"). James Ellis' parents, Elmer and Ada Ellis ("Parents"), own the property bordering to the east and northeast of the Disputed Property; Billy and Susan House ("Houses") own the property bordering to the west and northwest of the Disputed Property. The Disputed Property's southern boundary is Lower Helton Road, from which two roads run northward and circle around the Disputed Property until they meet at the northwest point of the property. The road to the east and north of the Disputed Property is Corley Road and the road to the west and north of the Disputed Property is Amonette Road.

At some point, the Ellises decided to sell the Disputed Property and hired James and Miranda Harvey ("Harveys") as their real estate agents; after a period of time during which the property had not sold, the Harveys made an offer on the land. On August 7, 2002, the Ellises and the Harveys entered into a Purchase and Sale Agreement ("Agreement"), whereby the Harveys agreed to purchase the Disputed Property for $142,800. Pursuant to the Agreement, the Harveys were required to obtain a survey of the property, which the Ellises were to sign to show their agreement with the boundary of the property; the Parents were also required to sign the survey to show their agreement as adjoining landowners. On August 15, 2002, Paul Crockett, a surveyor hired by the Harveys, conducted a survey of the Disputed Property and found that the property was bounded by the aforementioned roads (i.e., Lower Helton Road formed the southern boundary, Corley Road formed the eastern and northeastern boundary, and Amonette Road formed the western and northwestern boundary). The survey was reviewed by the Ellises and was signed by the Ellises and the Parents. The Ellises and the Harveys closed on the property on August 30, 2002.

The Harveys' intent was to develop the Disputed Property; they created a business plan and applied to the DeKalb County Planning Commission for plat approval. The plan was initially approved but, after objections from the Ellises, the Parents and the Houses, the process was halted. The Ellises, the Parents, and the Houses claimed that the boundary of the Disputed Property did not extend to Corley Road and Amonette Road, but rather was a "fence line" or a "tree line" that fell inside the roads.

On November 18, 2003, the Harveys filed a Complaint Quia Timet against the Ellises, the Parents, the Houses, and DeKalb County (collectively herein referred to as "Defendants"), asking that the "Defendants [be] legally estopped repudiate [sic] the property line signed off on in the [Crockett] survey"; "that title to the property of [the Harveys'] be quieted in them according to the recorded survey of Paul Burton Crockett"; "[t]hat an injunction issue against each of the Defendants to preclude them from encroaching upon [the Harveys'] lands"; and "[f]or damages in the sums [sic]

of $30,000 by reason of the unwarranted interference of the Defendants in business and contract to the detriment and loss of the [Harveys]." Each defendant filed a separate answer.[1]

On December 20, 2004, the Harveys filed an amended complaint, adding a claim for "common law prescription by reason of possession for a period of 20 years or more" on the basis of "tacking"; deleting their claim for "interference in business and contract for the sum of $30,000" and substituting a paragraph containing the same cause of action for "$50,000...for their land which they have been unable to use for their intended business purposes by reason of the wrongful interference and unwarranted actions of the Defendants"; and adding a claim for punitive damages in the amount of "$250,000 by reason of the wrongful interference in the business and contract of the [Harveys] to their loss and damages."

On April 8, 2005, the Ellises answered the Harveys' amended complaint and filed a counter-complaint, asking that, "based upon mistake, or, alternatively, fraud," the "deed from the [Ellises] to the [Harveys] be reformed in such a manner to reflect the true and accurate intent of the parties and to contain the actual description of the property conveyed."

On February 21, 2006, the Harveys filed an "Amendment to Amended Complaint Quia Timet," adding a claim against the Ellises for breach of the covenants of seisin and warranty and for "breach of the sale/purchase contract." The filing also added a claim against the Parents for "$150,000 for the unlawful inducement of breach of the land/sale contract between [the Ellises] and [the Harveys], the inducement for breach of their covenants of seisin and breach of their warranty to defend the title to [the Harveys'] land against the claims of all persons whosoever and the repudiation of signatures signed on the boundary survey by [Mr. Crockett]."

On March 10, the Houses and Parents filed separate cross-complaints against DeKalb County, seeking to have the court declare that Corley and Amonette Roads were not public or county roads. DeKalb County answered the cross-complaints, asserting that Corley Road and Amonette Road were county roads.

On April 10, the Houses filed a Motion for Summary Judgment, seeking the dismissal of the Harveys' claims for prescription and intentional interference with business relations. In an order entered on July 10, the court (1) granted the motion in regard to the claim for intentional interference with business relations in favor of Ms. House because there were no allegations of such conduct specifically made against her and (2) denied the motion in regard to the prescription claim.[2] The trial court also dismissed the claim for intentional interference with business relations against Mr. House because "the facts so alleged failed to state a cause of action for intentional interference with a

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[1] The Ellises, the Parents, and the Houses also filed counter-complaints against the Harveys. While the trial court addressed most of the counterclaims at trial, the disposition of some is not apparent in the record. The Defendants, however, do not challenge the court's disposition of any of their counterclaims. The Harveys, however, do contest the trial court's disposition of the Ellises' counterclaim for reformation of the deed, which will be discussed *infra*.

[2] The Houses also sought judgment on the Harveys' claim for punitive damages; in its order, the trial court stated that the Harveys "have withdrawn their claim for punitive damages and that issue is moot."

business relationship."[3] The Harveys filed an "Objection to Order," asserting that the trial court's sua sponte dismissal of their intentional interference with business relations claim against Mr. House was error. The court considered the "Objection to Order" to be a motion to alter or amend and set the matter for a hearing.

On August 7, the Houses filed a Motion to Dismiss, asserting that the Harveys failed to state a claim for intentional interference with business relations.[4] On August 8, the trial court granted the Harveys 15 days to amend their pleadings to plead "more definitely and specifically in their claim of Intentional Interference In Business."

On August 11, the Parents filed a Motion to Dismiss, asserting that the Harveys failed to state a claim for intentional interference in business relations, unlawful inducement of breach of the Agreement, and unlawful inducement for breach of the covenants of seisin and warranty. Also on that day, the Harveys filed an amended complaint pursuant to the trial court's August 8 order; the Houses and the Parents each filed an answer to the amended complaint.

On August 28, the trial court entered an order setting aside its sua sponte dismissal of the Harveys' claim for intentional interference with business relations against Mr. House and denying the Houses' motion to dismiss that claim. Also on that day, the trial court issued a separate order granting the Parents' motion to dismiss both claims for unlawful inducement of the breach of the Agreement and breach of the covenants of seisin and warranty, based upon the Harveys' concession that same should be dismissed, and denying the motion in regard to the claim for intentional interference with business relations.

The parties conducted discovery and depositions until the Harveys, the Houses, and the Parents all filed motions for partial summary judgment.[5] In an order entered on April 16, 2008, the trial court denied the Harveys' motion, granted the Houses' and Parents' motions, and dismissed the Harveys' claim for intentional interference with business relations against the Houses and the Parents.

A five-day bench trial commenced on May 19, 2008, and the court reconvened on June 3 to issue its ruling from the bench. An order reflecting that ruling was entered on July 23, 2008, in which the trial court found that: (1) the Ellises did not breach the Agreement; (2) the boundary between the Disputed Property and the Houses' and the Parents' properties "should be set out in prior deeds, i.e., the fence/tree line" and "that the survey prepared by Crockett Surveying was faulty,...that the method Crockett used was sub-par and further that Suveyor Crockett's testimony

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[3] The trial court relied upon *Huckeby v. Spangler*, 521 S.W.2d 568 (Tenn. 1975) for the proposition that a "trial court has authority to dismiss a complaint sua sponte in the absence of a motion to dismiss when the complaint fails to state a claim upon which relief can be granted."

[4] The motion to dismiss was filed on behalf of Mr. and Ms. House, even though the trial court granted summary judgment on this claim to Ms. House.

[5] The record contains the Harveys' Statement of Undisputed Material Facts, the Parents' Response to the Harveys' Motion for Partial Summary Judgment, and an order of the trial court disposing of the Harveys' motion for summary judgment; the Harveys' motion for summary judgment, however, cannot be found in the record.

was not credible"; (3) the testimony of the closing attorney, Brian Smith, was not credible, the testimony of Ms. Harvey regarding the business plans and the monies expended was credible, Mr. Harvey's testimony was not credible, the testimony of the Ellises and Mr. House was credible, and the testimony of Richard Puckett, a surveyor, was credible; (4) the court previously ruled that the Harveys' "damages were speculative and hence [the Harveys] failed to carry their burden of proof with regard to any issue concerning damages" and that, "if the Court is wrong in this regard, the Court would still not award any damages...due to the [Harveys'] failure to mitigate damages as shown by the testimony of Mr. Harvey"; (5) Corley Road was "a county road up to where it meets the road referred to as Amonette Road" and Amonette Road was not a county road but rather was an easement referred to in the Houses' deed; and (6) the Harveys "cannot prevail on their prescriptive possession argument based upon nothing being adverse between the [Harveys'] predecessors in title and all adjoining land owners."

The trial court then: (1) dismissed the breach of contract claim against the Ellises; (2) voided the Crockett survey and ordered it "not to be relied upon by anyone for any purpose"; (3) declared the "southern boundary of the subject property shall be the Lower Helton Road, and the western, northern, and eastern boundaries shall be the line fence/tree line as shown on the Bartlett plat"[6]; (4) reformed the "Deed from the Ellises' to the Harveys'...based upon the mistake in the property description, said property description be reformed to reflect the actual property line that is contained in" the Ellises' deed; (5) declared that Corley Road was a county road and Amonette Road was not a county road; (6) dismissed the Harveys' claim for damages against the Elises; (7) dismissed the Harveys' claim of prescription; and (8) denied the Ellises' request for attorneys' fees since there was no breach of contract.

The Houses, Ellises, and Parents filed post-trial motions for discretionary costs. On October 9, the trial court entered an order awarding $1,866.19 to the Parents; $1,890.69 to the Ellises; and $2,820.94 to the Houses.[7] The Harveys and the Ellises appeal.

II. Statement of the Issues

The Harveys raise the following issues:

> 1. Is the great weight of the evidence contrary to the court's findings that the boundary line is established by a tree line as opposed to the roadways Ammonette and Corley?
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> 2. As a matter of law and as findings of fact, did the court err when it failed to find that Ammonette Road and Corley Road, as they circle the property conveyed, were not county roads?

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[6] Alfred Bartlett drafted a court-ordered plat of the property, which contained the Crockett boundary line, the boundary asserted by the Harveys, and the fence/tree line boundary asserted by the Ellises, Parents, and Houses.

[7] The order awarded discretionary costs pursuant to Rule 54, Tenn. R. Civ. P., however, the court did not explain the basis of the awards.

3. As a matter of law, did the court err in failing to rule that the Ellises and Parents were estopped from denying the property line in regard to the property conveyed as to the Harveys based upon their affirmation of the survey and the execution of the warranty deed?

4. As a matter of law, did the court err in failing to find that the Ellises breached their contract of sale and their warranty of title, in conveying the property based upon the affirmation of the survey and the execution of the warranty deed and for which they would owe damages?

5. As a matter of the law, did the court err in dismissing the claim for tortious interference of contract against the Houses and the Parents for their disruption of the development process causing the DeKalb County Planning Commission to fail to issue permits for the development?

The Ellises raise the following issue:

1. Did the Trial Court err in denying an award of attorneys fees to the Ellises?

III. Standard of Review

Review of the trial court's findings of fact is *de novo* upon the record accompanied by a presumption of correctness, unless the preponderance of the evidence is otherwise. *See* Tenn. R. App. P. 13(d); *Kaplan v. Bugalla*, 199 S.W.3d 632, 635 (Tenn. 2006). Review of the trial court's conclusions of law is *de novo* with no presumption of correctness afforded to the trial court's decision. *See Kaplan*, 199 S.W.3d at 635.

IV. Analysis

As a preliminary matter, the Harveys, as the appellants, have the burden of making citations to appropriate authorities and references to the record in their brief to support their argument on appeal. Tenn. R. App. P. 27(a)[8]; Tenn. R. App. P. 27(g)[9]; *State v. Weaver*, 2003 WL 1877107, at *16 (Tenn. Crim. App. Apr. 15, 2003) (citing Tenn. R. App. 27(a)(4), (7)); *see also Vineyard v. Betty*, 2002 WL 772870, at *3 (Tenn. Ct. App. Apr. 30, 2002); *State v. Bunch*, 646 S.W.2d 158, 160 (Tenn.

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[8] Rule 27(a)(7), Tenn. R. App. P., provides in relevant part:

(7) An argument, which may be preceded by a summary of argument, setting forth the contentions of the appellant with respect to the issues presented, and the reasons therefor, including the reasons why the contentions require appellate relief, with citations to the authorities and appropriate references to the record (which may be quoted verbatim) relied on....

[9] Rule 27(g), Tenn. R. App. P., provides in relevant part:

...reference in the briefs to the record shall be to the pages of the record involved....If reference is made to evidence, the admissibility of which is in controversy, reference shall be made to the pages in the record at which the evidence was identified, offered, and received or rejected.

1983); *McDonald v. Onoh*, 772 S.W.2d 913, 914 (Tenn. Ct. App. 1989). The argument section of the Harveys' brief contains few citations to authority and no citations to the record to support their contentions.

In the case of *Lykins v. Key Bank USA, N.A.*, 2006 WL 2482963 (Tenn. Ct. App. Aug. 29, 2006), we were presented with an appellant's brief that contained no citations to the record. *Lykins*, 2006 WL 2482963, at *4. After discussing the appellant's failure to comply with the Tenn. R. App. P. 27(a)(6), we discussed Rule 6(b) of the Rules of the Court of Appeals which provides that:

> [n]o complaint of or reliance upon action by the trial court will be considered on appeal unless the argument contains a specific reference to the page or pages of the record where such action is recorded. *No assertion of fact will be considered on appeal unless the argument contains a reference to the page or pages of the record where evidence of such fact is recorded.*

Id. at *4-5 (quoting Tenn. R. Ct. App. 6(b)) (emphasis added).

A similar situation arose in *Bean v. Bean*, 40 S.W.3d 52 (Tenn. Ct. App. 2000), where the appellant's brief failed to comply with Tenn. R. App. P. 27 and Rule 6 of the Rules of the Court of Appeals. In *Bean*, the deficiencies resulted in a dismissal of the appeal. There, we held:

> Courts have routinely held that the failure to make appropriate references to the record and to cite relevant authority in the argument section of the brief as required by Rule 27(a)(7) constitutes a waiver of the issue. . . . Because of the numerous deficiencies in Appellant's brief, we decline to address the issues raised. As noted in *England v. Burns Stone Co., Inc.*, 874 S.W.2d 32, 35 (Tenn. Ct. App. 1993), parties cannot expect this court to do its work for them. This Court is under no duty to verify unsupported allegations in a party's brief, or for that matter consider issues raised but not argued in the brief.

Bean, 40 S.W.3d at 55-56 (citations omitted).

Rule 1 of the Rules of the Court of Appeals permits this Court to review a party's issues on appeal despite apparent citation deficiencies in order to expedite a decision upon the matter.[10] While, as stated in *Bean*, we are under no duty to consider an issue raised but not properly argued in their brief, *Bean*, 40 S.W.3d at 55-56 (citing *Duchow v. Whalen*, 872 S.W.2d 692, 693 (Tenn. Ct. App. 1993); *Airline Constr., Inc. v. Barr*, 807 S.W.2d 247 (Tenn. Ct. App. 1990)), the appellees have set forth argument and citations to the record in their briefs in response to the Harveys' contentions; consequently, we will review the issues presented.

[10] Rule 1of the Rules of the Court of Appeals of Tennessee permits "for good cause, including the interest of expediting a decision upon any matter, this Court . . . [to] suspend the requirements or provisions of any of these rules in a particular case on motion of a party, or on its own motion, and may order proceedings in accordance with its discretion."

A. Boundary Line of the Disputed Property

The Harveys assert that the weight of the evidence is contrary to the trial court's finding regarding the boundary line of the Disputed Property because "[t]he record...is absent any...proof of [the fence line/tree line] with the exception of a reference to a tree line in one of the Deeds which cannot be identified with any degree of certainty." In support of this assertion, the Harveys contend that "[t]he Court heard independent proof...from an appraiser and two real estate agents that the property had been identified to them for their purposes as bounded on all sides by the Seller's Ellis [sic]. Literally all of the trial exhibits with the exception of the Deed which made mention a tree line, described the property as being bounded on all sides by roads." Despite their reference to such proof, the Harveys do not identify the "appraiser and two real estate agents" upon whose testimony they rely or indicate which trial exhibits "describe[] the property as being bounded on all sides by roads." The Harveys do admit in their brief that "the Defendant presented proof that previously a tree line had existed which had been removed...., but some evidence of the formerly [sic] tree line could be found."

In their brief on appeal, the Houses[11] assert that "every single person who testified about any knowledge of the boundary line stated that the boundary between the [Harveys'] property and the property owned by [the Houses and the Parents], was the tree line." In support of this assertion, the Houses cite to the testimony of James and Patty Ellis, Elmer Ellis, Billy House, Jack Brown,[12] and DeKalb County Mayor Mike Foster, all of whom testified that their understanding of the boundary line of the Disputed Property was the fence line/tree line.

In its July 23 order, the trial court found that "the survey prepared by Crockett Surveying was faulty, and that the method Crockett used was sub-par"; that "the southern boundary of the subject property shall be the Lower Helton Road, and the western, northern, and eastern boundaries shall be the line fence/tree line as shown on the Bartlett Plat"; and that "the old aerial photos show the fence/tree line."

Because the trial court observes the witnesses as they testify, it is in the best position to assess witness credibility. *Frazier v. Frazier*, 2007 WL 2416098, *2 (Tenn. Ct. App. Aug. 27, 2007) (citing *Wells v. Tenn. Bd. of Regents*, 9 S.W.3d 779,783 (Tenn. 1999)). Therefore, we give great deference to the court's determinations on matters of witness credibility. *Id*. "Accordingly, we will not reevaluate a trial judge's credibility determinations unless they are contradicted by clear and convincing evidence." *Id*.

Upon a review of the record, we find that the evidence supports the trial court's finding regarding the boundary of the Disputed Property. There is no clear and convincing evidence to contradict the court's determination that the testimony cited by the Houses that the boundary of the

[11] The Ellises, in their brief on appeal, adopt the argument put forth by the Houses on this issue. The Parents do not specifically adopt the Houses' argument, but their argument mirrors the Houses' argument almost verbatim.

[12] Jack Brown is the Ellises' immediate predecessor-in-interest to the Disputed Property.

Disputed Property was the tree line was credible.[13] Furthermore, contrary to the Harveys' assertion that the tree line could not be "identified with any degree of certainty," the Harveys admit that evidence of the former tree line could be found and the trial court stated that the tree line was evident from "old aerial photos." The Harveys also admit that the tree line was mentioned in a deed located in the chain of title to the Disputed Property. There was no citation to the evidence referred to by the Harveys in support of their argument. Based on the credible testimony and documentary evidence and the lack of reference to evidence to the contrary, we find that the preponderance of the evidence supports the court's finding that the boundary of the Disputed Property was the fence line/ tree line.

B. County Roads

The Harveys assert that "[t]he great weight of the evidence would preponderate against the trial courts [sic] findings that Corley and Ammonette were not public roads and/or county roads completely surrounding and bounding the property." The trial court, however, determined that Corley Road was "a county road up to where it meets the road referred to as Amonette Road." Since the trial court did not commit the error alleged by the Harveys, we find their contention with regard to Corley Road to be without merit.[14] The remaining question is whether the evidence supports the court's finding that Amonette Road was not a county road.

In support of their argument, the Harveys[15] contend that "[t]he general public used the roads for access to other nearby tracks [sic], cemeteries, school bus routes, and the county listed the roads on their county road map." The Harveys also claim that "[t]he County had maintained each of these roads for years, halting only once when some property owner objected, but then returning to the same thereafter, until finally they actually improved the road to a chip and tar surface at the request of one of the Defendants in this action." The Harveys cite to no evidence in the record to support these contentions.

The Houses[16] assert that "the Trial Court was correct in its determination that Amonette Road is not a public road, but is the 15-foot easement...referred to in the House deed that has been of record for more than 20 years." In support of their contention, the Houses refer to the testimony of Kenny Edge, Superintendent of the Road Department[17]; Doyle Washer, a road grader for the DeKalb

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[13] Specifically, the court found that the testimony of Mr. Crockett and Mr. Harvey was not credible and that the testimony of James Ellis, Patty Ellis and Billy House was credible.

[14] None of the parties challenge the trial court's finding regarding Corley Road.

[15] In its brief on appeal, DeKalb County states that "the only issue that affects DeKalb County is Issue II of [the Harveys']" brief and that it adopts the Harveys' argument that Amonette Road is a county road.

[16] The Houses were the only appellees to respond to the Harveys' challenge to the trial court's finding regarding Amonette Road.

[17] Mr. Edge testified that Corley and Amonette Roads were on the county road map, but that the County did not have any "right-of-way deeds" to the roads. Counsel for the Harveys attempted to admit the county road map as an exhibit at trial, however, its admission was objected to on the grounds that it was not authenticated or certified; the map (continued...)

County Highway Department[18]; and Billy House.[19] The Houses also cite to their deed, admitted as an exhibit at trial, which "references a 15 foot easement from the Lower Helton Road to the Billy Corley property."[20]

In its July 23 order, the trial court stated that its finding that Amonette Road was not a county road was based on Mr. Washer's testimony that "he graded the road and was 'chased off' of the property by the previous owner," that "the county did not do any work on that road for seven to eight years," and that "he knew of no other occasion where the county was barred from working on a road that it thought was a county road." The court concluded that Amonette Road was the easement referenced in the Houses' deed.

Upon a review of the record, we find that the evidence supports the trial court's finding that Amonette Road was not a county road. Mr. Edge testified that DeKalb County did not have any documented ownership interest in the road, despite its listing on the county road map. Mr. Washer testified that the county road graders left Amonette Road after being instructed by the Houses' predecessor-in-interest to leave and that DeKalb County did not contest its exclusion from the land. Mr. House testified that DeKalb County refused to fix Amonette Road because the road was not located on a mail or school bus route. The Houses' deed shows that a 15 foot easement over their property was created. Again, the Harveys do not cite any evidence in support of their contentions and we are under no obligation to verify such allegations. *Bean*, 40 S.W.3d at 55-56. The evidence preponderates in favor of the trial court's finding that Amonette Road was not a county road.

C. Reformation of the Deed

In its July 23 order, the trial court ordered that "the Deed from the Ellis' to the Harveys'...be reformed based upon the mistake in the property description, said property description to be reformed to reflect the actual property line that is contained in the...Ellis Deed, which is the old tree line/fence line that surrounds the subject property." During the hearing on June 3, the trial court explained its decision to reform the deed:

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[17](...continued)
was admitted for identification purposes only.

[18] Mr. Washer testified that the Houses' predecessor-in-interest, Mack Wiseman, told the road graders not to "come back on [his] road" and that he did not grade Amonette Road thereafter. Mr. Washer also testified that, even though he had previously graded Amonette Road, "the county road grader has graded some roads that were not county roads."

[19] Mr. House testified that he "always had a 15-foot easement through all the deeds that [he] looked back." Mr. House also stated that, after he purchased his property, he asked Mr. Edge, and Mr. Edge's predecessor, for gravel to fix Amonette Road and that both men declined because the road was not on a mail or school bus route.

[20] The Houses' deed contains the following language: "It is understood that this land is being conveyed subject to a 15 foot easement for right-of-way purposes running through said land to the Billy Corley property." The Billy Corley property is the parcel of property north of the Houses' property.

> [Mr. Crockett] just went basically, from what the Court finds from the credible proof here, from what Mr. Harvey told him the area he was buying was inside those roads; that being Lower Helton, Amonette Drive, and Corley Road.
> ***
> Mr. Crockett, the Court did not find that his testimony was credible. Again, it was based on - - he based it on what Mr. Harvey told him.
> ***
> Mr. Harvey admitted in his deposition that he bought the Ellis property subject to the description in the [Ellises'] deed....He admits in one place that he told Crockett that he should survey out to the roadway. And in the testimony here at trial, he had contradictory testimony.
> He testified that James Ellis...told him the property touched all the roads. Yet in his deposition, he couldn't remember him ever telling him that.
> ***
> The Court finds that Mr. Harvey, from the testimony, had actually looked at the deeds, knew of the description [in the Ellises' deed]...and that he was aware prior to entering into this agreement where the old line fence was or the tree line fence.

The Harveys contend that, "[t]o the extent that [the Ellises] made a unilateral mistake, without fraud on the part of HARVEY, they should be estopped from attempted [sic] to reform the Deed." In their brief on appeal, the Harveys assert that "[t]here is not doubt [sic] that the HARVEYS intended to receive, and the [Ellises] intended to convey, land which the [Ellises] owned and which was described by a new survey produced by Crockett." The Harveys cite to no proof in the record to support this contention.

The Parents contend that "[t]he facts in this matter clearly rise to the level of mutual mistake or a mistake induced by the fraudulent conduct of [Mr.] Harvey." In support of this assertion, the Parents rely on the testimony of Elmer Ellis, James Ellis, and Patty Ellis,[21] all of whom testified that they told Mr. Harvey about the tree line boundary prior to the time Mr. Harvey contracted to buy the Disputed Property; the testimony of Mr. Harvey as to his personal knowledge of a fence previously located on the property[22]; and the testimony of Mr. Crockett,[23] that he did not refer to the deeds in

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[21] Elmer Ellis testified that he "told [Mr. Harvey] the tree line was the property line" and that he had "a survey that was done in 1984 that says so." James Ellis testified that he "told Mr. Harvey that the tree line was the property line all the way around the property except for a small area in front of [the Ellises'] house" and that he "never told Mr. Harvey that [his] property was bounded on all four sides by the road." James Ellis stated that he told Mr. Harvey about the tree line on at least three occasions. Patty Ellis testified that she "walked out on the front porch and...pointed out to [Mr. Harvey]...looking at the house as the tree line goes around, that that was the property line of that property."

[22] Mr. Harvey testified that he was "familiar with the property nearly [his] whole life" and that he did not "deny there wasn't a fence there at sometime."

[23] Mr. Crockett testified that he read the Ellises' deed and the reference to the fence line contained therein; that he never tried to locate the fence line; and that he never spoke with any of the adjoining landowners. Mr. Crockett admitted that he "ignored...in [his] survey any kind of line fence and just surveyed to the edge of the road all the way around" the Disputed Property. Lastly, Mr. Crockett stated that Mr. Harvey "told [him] he was buying what was in those roads" and that Mr. Harvey "told [him] to survey everything within the four sides of this road."

the chain of title to the property or discuss the property with the adjoining landowners before conducting his survey.

The Ellises assert that "[t]he enormous weight of the testimony is that [Mr.] Harvey, and those working in his employ, [Mr.] Crockett and closing attorney Brian Smith, did everything possible to attempt to expand the boundaries of the" Disputed Property. In support of this contention, the Ellises rely on the same testimony cited by the Parents.

This Court in *Wallace v. Hardin*, 1997 WL 775572 (Tenn. Ct. App. Dec. 17, 1997) addressed the issue of reformation of a deed:

> A court of chancery has the power to reform and correct errors in deeds produced by fraud or mistake. A court of equity has the power to reform a deed if the parties in interest are before the court and have an opportunity to be heard, and the case is made out by full and satisfactory proof. To be the subject of correction, a mistake in an instrument must have been mutual or there must have been a mistake of one party influenced by the fraud of the other. A mutual mistake is one common to both parties to a contract, each laboring under the same misconception; more precisely, it is one common to all the parties, wherein each labors under the same misconception respecting a material fact, the terms of the agreement, or the provisions of the written instrument designed to embody such agreement.

Id. at *3 (internal citations omitted). "To authorize a reformation for mistake, the evidence must be clear and conclusive." *Id*. at *5.

We find that the evidence clearly and conclusively demonstrates that the Ellises were mistaken as to the description of the boundary of the Disputed Property in the deed and that such mistake was influenced by the fraud of the Harveys. There is no clear and convincing evidence in the record to contradict the trial court's finding that the testimony that Mr. Harvey knew that the boundary of the Disputed Property was the tree line was credible.[24] Based upon such testimony, along with Mr. Crockett's testimony regarding Mr. Harvey's instructions to survey the land inside the roads, we find that the trial court did not err in reforming the Harveys' deed.

D. Equitable Estoppel

The Harveys contend that the Ellises and the Parents "should be estopped from denying the Crockett survey as the proper boundary" of the Disputed Property because they "knew the [real estate] transaction was based on the agreed property line to be established by the survey." Consequently, the Harveys assert that the Ellises and the Parents "should be...estopped from claiming that the land they conveyed by warranty deed is anything other than that so described."

Estoppel is defined as "[a] bar that prevents one from asserting a claim or right that contradicts what one has said or done before or what has been legally established as true." Black's

[24] The trial court specifically found that the testimony of Elmer Ellis and Patty Ellis in regard to Mr. Harvey's knowledge of the tree line was credible.

Law Dictionary (8th ed. 2004). "The burden of establishing an estoppel rests upon the party who invokes it." *Jenkins Subway, Inc. v. Jones*, 990 S.W.2d 713, 723 (Tenn. Ct. App. 1998). In regard to the party asserting the defense of estoppel, here the Harveys, the essential elements are: (1) the asserting party's "[l]ack of knowledge and of the means of knowledge of the truth as to the facts in question," (2) the asserting party's "[r]eliance upon the conduct of the party estopped," and (3) "[a]ction based thereon of such a character as to change [the asserting party's] position prejudicially." *Thornton v. Higdon*, 2008 WL 4693737, at *5 (Tenn. Ct. App. Oct. 23, 2008) (citing *Davis v. Cuel*, 2007 WL 4548442, at *6 (Tenn. Ct. App. Dec. 27, 2007)). In regard to the party to be estopped, here the Ellises and the Parents, the essential elements are:

> (1) Conduct which amounts to a false misrepresentation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) Intention, or at least expectation that such conduct shall be acted upon by the other party; (3) Knowledge, actual or constructive of the real facts.

Id. (citing *Davis*, 2007 WL 4548442, at *6).

In light of the evidence in support of the reformation of the deed, referenced *supra*, and our disposition of that issue, we find that the trial court did not err in rejecting the Harveys' claim that the Ellises and Parents were estopped from denying the boundary depicted in the Crockett survey. As stated earlier, the credible testimony was that Mr. Harvey was informed by the Ellises and the Parents that the boundary of the Disputed Property was the fence line/tree line. Furthermore, the Ellises' deed, which was recorded in the chain of title to the Disputed Property, contained a reference to the tree line boundary. Thus, we find that Mr. Harvey did not have a "[l]ack of knowledge and of the means of knowledge of the truth as to the facts in question" nor did the Ellises or the Parents engage in "[c]onduct which amounts to a false misrepresentation or concealment of material facts." The trial court did not err in dismissing the Harveys' claim that the Ellises and the Parents were estopped to deny that the boundary of the Disputed Property was as set forth in the Crockett survey.

E. Breach of Contract

Section 5 of the Agreement states that "at the time of closing, [the Ellises] will convey or cause to be conveyed to [the Harveys] good and marketable title to said Property by general warranty deed." The Agreement also contained a Survival Clause, which states that "[a]ny provision herein contained, which by its nature and effect, is required to be performed after closing shall survive the closing and delivery of the deed and shall remain binding upon the parties to this Agreement and shall be fully enforceable thereafter."

The Harveys included a claim against the Ellises for breach of the Agreement, contending that "[t]he benefit of the bargained for value of the [Agreement] has been breached"; that the Agreement "obligated [the Ellises] to convey good title to the property so described"; that "the property conveyed by them is now after reformation of a distinctively different character"; and that the Ellises are "liable for attorney's fees and expenses, costs, and damages in contract and tort." The Harveys also contend that the Survival Clause prevented the Agreement from merging into the deed at closing.

The essential elements of a breach of contract claim are: (1) the existence of a contract; (2) nonperformance amounting to a breach of that contract; and (3) damages caused by the breach of that contract. *See Lifecare Ctrs. of Am., Inc. v. Charles Town Assocs. Ltd. P'ship, LPIMC, Inc.*, 79 F.3d 496, 514 (6th Cir. 1996). Generally, "where an executory contract has been entered into between the parties for the sale and purchase of real estate...the contract of sale being merely an executory contract merges into the deed and the deed, therefore, becomes the final contract which governs and controls." *Fuller v. McCallum & Robinson*, 118 S.W.2d 1028, 1037 (Tenn. Ct. App. 1937).

The trial court found the following in regarding to the breach of contract claim:

> ...[T]he parties entered into an agreement for purchase of this property....This was a Contract of Sale between [the Harveys] and [the Ellises] selling a tract of land at 194 Amonette Drive in Alexandria, Tennessee, in DeKalb County, recorded in the Register's Deed Book 98, Page 1, containing 25 acres.
> ***
> The Ellis[es]...had bought their property from the Browns. That deed was recorded here in the Register's Office, and it's referred to in this contract. It was prepared by Mr. Harvey and entered into by the Harveys and the Ellis[es].
> ***
> Based on the proof and the record, the Court does not find that there was a breach of contract in this case. In looking at the exhibit where the contract was prepared, of course, the Court is required under Tennessee law to interpret a contract against the preparer, in this case, Mr. Harvey.
> The contract provided that the Ellis[es]...were selling that tract of land located on Amonette Road. It describes in the contract the book and the page where this land was located. There's also this issue about the survey. But that's what they were required to convey, and that's what this Court feels they conveyed in this case.

Upon a review of the Agreement, we find that the trial court did not err in dismissing the Harveys' breach of contract claim. The Survival Clause specifically provides for the survival of any provision of the Agreement that is "required to be performed *after* closing"; the language of Section 5 of the Agreement, however, states that the Ellises were to convey good title to the property "at the time of closing." Furthermore, as stated by the trial court, the Ellises were required to convey good title to the land pursuant to the Ellises' deed recorded in the Register's Office; such deed referred to the tree line as the boundary of the Disputed Property. Thus, as a result of the reformation of the deed, the Harveys have title to the land described in the Agreement. Consequently, we do not find the Harveys' prosecution of the present boundary dispute to have been a result of any "nonperformance amounting to a breach of [the Agreement]" on the part of the Ellises.[25]

[25] In addition to the breach of the Agreement claim, the Harveys also assert error in the trial court's disposition of their claim for "breach of their warranty to defend the title" against the Ellises. In their brief on appeal, the Harveys contend only that the Ellises "have failed to defend the title on behalf HARVEYS [sic]" and that "[t]he HARVEYS title was called into question and [the Ellises] were required to defend the title in this action." Pursuant to Rule 27, Tenn. R. App. P., we find the Harveys' brief to be so devoid of citation to legal authority, reference to the record, or argument in support of their position so as to warrant wavier of this issue. *Bean*, 40 S.W.3d at 55-56.

F. Tortious Interference with Business Relations

The trial court dismissed the Harvey's claim for tortious interference with business relations against the Houses and the Parents on those parties' motion for partial summary judgment.[26] The Harveys assert that "[t]he evidence preponderates against th[e] dismissal [of their claim for tortious interference] as the proof shows that the HARVEYS plan to develop the property was in the process of clearing the planning commission until derailed by the complaints of [the Houses and the Parents] and their claims that the survey included their realty." In support of this assertion, the Harveys state only that "[t]he matter should be remanded for a hearing on the merits of the issues of the damages of the [Harveys] for this cause of action." The Harveys do not cite any authority or make reference to the record to support their contention that the trial court erred in granting summary judgment to the Parents and the Houses on this claim and their argument is wholly insufficient to allow for a discussion of same. Pursuant to Rule 27, Tenn. R. App. P., we find that the Harveys have waived the review of this issue. *Bean*, 40 S.W.3d at 55-56; *see also* Rule 6, Rules of the Court of Appeals.

G. Attorneys' Fees

The Ellises' request for attorneys' fees was made pursuant to section 13 of the Agreement, which states, in part pertinent, that "[i]n the event that any party hereto shall file suit for breach or enforcement of this Agreement (including suits filed after closing which are based on or related to the Agreement), the prevailing party shall be entitled to recover all costs of such enforcement, including reasonable attorney's fees." In its July 23 order, the trial court found that, "there being no breach of contract involving the sale's contract between [the Harveys] and [the Ellises], each will pay their own attorney fees."

The Ellises assert that "Paragraph 13 requires that 'any party' may file suit for breach or enforcement of this [A]greement" and that it "allows the award of attorney fees to the 'prevailing party.'" They argue that, since the Harveys filed the suit for breach of the Agreement and the Ellises were the prevailing party, the court should have awarded them attorneys fees.

Upon a review of the Agreement, we agree that the Ellises are entitled to an award of attorneys' fees. The Agreement allows for an award of fees to the prevailing party in a suit for breach or enforcement of the Agreement, regardless of which party actually brought the suit. Consequently, the Ellises were entitled to an award of fees associated with their defense of the claim and the court's ruling to the contrary is reversed.

The American Rule allows a party to recover attorneys' fees for work done on claims that carry a contractual right to recover such fees; fees incurred on claims that do not carry a contractual right are not recoverable. *Whitelaw v. Brooks,* 138 S.W.3d 890, 893 (Tenn. Ct. App. 2003). Consequently, the Ellises would be entitled to an award of only those fees incurred in the defense of the Harveys' claim for breach of the Agreement. The case must be remanded for a determination of the amount of fees which are properly awardable under the Agreement and in accordance with RPC 1.5 of Tennessee Supreme Court Rule 8 and this opinion.

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[26] The disposition of the Harveys' claim against the Ellises for tortious interference with business relations is not apparent in the record; this claim is not an issue on appeal.

V. Conclusion

For the reasons set forth above, the decision of the Chancery Court is AFFIRMED IN PART, REVERSED IN PART, and REMANDED for a determination of attorneys fees to be awarded the Ellises.

Costs of this appeal are assessed against the Harveys for which execution may issue if necessary.

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RICHARD H. DINKINS, JUDGE